Supreme Court, U.S.
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DOCKET NO. _____

In The
Supreme Court of the United States

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TOMMY D. HOPKINS,
Petitioner,

v.

JOHN L. SAUNDERS, KYLE VICKERS, CHARLES AUSFAHL, ROY TEMPLE AND BETH M. WHEELER,
Respondents.

– ♦ –

Petition for Writ of Certiorari
To the United States Court of
Appeals For the Eighth Circuit

– ♦ –

1ST CORRECTED PETITION FOR WRIT OF CERTIORARI

– ♦ –

* **TOMMY D. HOPKINS**
2408 Oakview Dr.
Jefferson City, Missouri 65109-0738
(573) 636-9534
* ***Pro Se* Petitioner**

4/6 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a **42 U.S.C. § 1983** plaintiff that was a tenured, public employee of the State of Missouri is entitled to relief in the form of reinstatement with back pay and benefits when the employee was terminated without benefit of due process in that he did not receive verbal or written notice prior to being terminated (Exhibit A to Second Amended Complaint, D.Ct. Doc. 43; Plaintiff's Hearing Exhibit 5; Appendix hereto at p. 123); was terminated without benefit of a pre-termination hearing; and, had to wait for over four (4) years for any type of post-termination hearing when:
   (a) the courts below determined that the employee had an established property right interest in his job;
   (b) the courts below determined that the employee was covered by a written merit system that stated he could only be dismissed for cause;
   (c) the written merit system that covered the employee set out specific procedures for termination that required that the employee be given specific written notice and a pre-termination hearing prior to termination; and,
   (d) the courts below determined that the written merit system that covered the employee contained specific language that states in pertinent part that:
      "No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the director gives to the employee a written statement setting forth in substance the reason therefore and files a copy of the statement with the board." **Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VIII(5).** (Exhibit 14 to D.Ct. Doc. 52; Plaintiff's D.Ct.

Hearing Exhibit 3; Appendix hereto at pp. 118-119).

2. Whether—in conformance with Missouri case law—the courts below should have declared a **42 U.S.C. § 1983** plaintiff's termination as being "null and void" for the employing agency's failure to follow its own written merit system procedures in the termination of the employee. **Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VIII(5).** (Exhibit 14 to D.Ct. Doc. 52; Plaintiff's D.Ct. Hearing Exhibit 3; Appendix hereto at pp. 118-119).

3. Whether the courts below were in error in denying a **42 U.S.C. § 1983** plaintiff a jury trial on claims that he was terminated in violation of his First Amendment right of freedom of speech in reporting wrongdoings and that he was terminated in violation of his Fourteenth Amendment right of equal protection under the law for handling of a sexual harassment complaint and reporting it to his supervisor; and/or, were the courts below in error in failing to make a "pre-textual" or "mixed motive" analysis as to the reasons as to a **42 U.S.C. § 1983** plaintiff's termination, and/or, were the courts below in error in failing to allow a jury to determine if the proffered reasons for termination of a **42 U.S.C. § 1983** plaintiff were "pre-textual" or "mixed motive" in nature when:
   (a) the aforementioned claims were set forth in the plaintiff's Second Amended Complaint (D.Ct. Doc. 43);
   (b) a request for jury trial was made (D.Ct. Doc. 2; Appendix hereto at p. 124);
   (c) Glenna Burre gave direct testimony that she verbally informed the **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) of actions made toward her by Charles Ausfahl that she deemed to be sexual

in nature (Hearing Transcript, Vol. I, pp. 234-235);

(d) Glenna Burre gave direct testimony that she filed a formal sexual harassment complaint against Charles Ausfahl (Hearing Transcript, Vol. I, pp. 234-235);

(e) the **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) gave direct testimony that Glenna Burre made a sexual harassment complaint to him concerning Charles Ausfahl and that he (Petitioner Hopkins) took immediate action in discussing the matter with Charles Ausfahl and reported the complaint and the action taken to his (Petitioner Hopkins) supervisor, Kyle Vickers (Hearing Transcript, Vol. II, pp. 290-292);

(f) Kyle Vickers gave direct testimony that he recommended that the **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) be fired (Hearing Transcript, Vol. I, pp. 120-121);

(g) Kyle Vickers gave direct testimony that the firing was his idea originally and that the **42 U.S.C. § 1983** plaintiff's (Petitioner Hopkins) handling of the sexual harassment complaint was a factor in his recommendation to fire Hopkins (Hearing Transcript, Vol. I, pp. 120-121);

(h) **42 U.S.C. Section 2000e-3(a)** states in pertinent part that:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . ., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

(i) **Missouri Revised Statutes: Chapter 105: Section 105.055.2.** states in pertinent part that:

"No supervisor or appointing authority of any state agency shall:
(1) Prohibit a state employee from or take any disciplinary action whatsoever against a state employee for the disclosure of any alleged prohibited activity under investigation or any related activity, or for the disclosure of information which the employee reasonably believes evidences:
(a) A violation of any law, rule or regulation;
* * * * * *
4. As used in this section, "disciplinary action" means any dismissal, demotion, transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work, whether or not the withholding of work has affected or will affect the employee's compensation."

4. Whether the court below was in error in making the determination that a **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) waived his First Amendment claim that he was denied freedom of speech, waived his Fourteenth Amendment claim that he was denied equal protection under the law (**42 U.S.C. Section 2000e-3(a)** and **Missouri Revised Statutes: Chapter 105: Section 105.055.2.**) even though there was direct testimony to support those claims and the **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) brought these unresolved claims to the trial court's attention on several occasions.

5. Whether the State of Missouri and the Missouri Department of Agriculture waived Eleventh Amendment immunity to suit in federal court when the agencies voluntarily chose to apply for designation as an official grain inspection agency under the **United States Grain Standards Act. (7 U.S.C. Section 71, et seq.)**

6. Whether the court below—so as to avoid clear error and to prevent manifest injustice—should have reconsidered their "law of the case" relating to the State of Missouri's and the Missouri Department of Agriculture's Eleventh Amendment immunity as an official designated inspection agency under the **United States Grain Standards Act. (7 U.S.C. Section 71, et seq.)**

7. Whether the court below was in error in denying the trial court's award of nominal damages to a **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) when that court made the determination that the award of nominal damages in the instant case are "legal" in nature rather than "equitable."

8. Whether the court below was in error in denying the trial court's award of attorney's fees to a **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) because without an award of at least "nominal damages" then the plaintiff (Petitioner Hopkins) is not a "prevailing party."

9. Whether the courts below were in error for denying the plaintiff's (Petitioner Hopkins) unopposed motion for a new hearing because the defense violated the trial court's order that witnesses not discuss their testimony and because one witness was allowed to remain in the courtroom throughout the entirety of the hearing—under objection by plaintiff's (Petitioner Hopkins) attorney.

10. Whether the courts below were in error for denying plaintiff's (Petitioner Hopkins) motion for a hearing whereby plaintiff (Petitioner Hopkins) could place into evidence information regarding the mental and emotional distress he suffered from being terminated without notice and a pre-termination hearing.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

JOHN L. SAUNDERS, individually and in his official capacity as the Director of the Missouri Department of Agriculture of the State of Missouri;

KYLE VICKERS, individually and in his official capacity as the Deputy Director of the Missouri Department of Agriculture of the State of Missouri;

CHARLES AUSFAHL, individually and in his official capacity as an employee of the Missouri Department of Agriculture of the State of Missouri;

ROY TEMPLE, individually and in his official capacity as the Deputy Chief of Staff and aide to the Governor of the State of Missouri; and

BETH M. WHEELER, individually and in her official capacity as the designated member of the Governor's staff as having supervisory authority over the Missouri Department of Agriculture.

PETITION FOR WRIT OF CERTIORARI
TABLE OF CONTENTS

Questions Presented for Review _____ *i-v*

List of Parties to the Proceedings in the Court Below _____ *vi*

Table of Contents of Petition for Writ of Certiorari _____ *vii*

Table of Authorities _____ *vii*
Cases _____ *viii-x*
Authorities _____ *xi-xiii*

Opinions and Orders of Courts Below _____ 1-2

Statement of Jurisdiction _____ 2

Constitutional Provisions, Treatises, Statutes, Rules and Regulations Involved _____ 3-9

Statement of the Case _____ 10-11

Reasons for Granting Writ _____ 12-28

Conclusion _____ 28-32

TABLE OF AUTHORITIES

CASES

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 582, 96 S.Ct. 1854, 1862, 48 L.Ed.2d 301 (1976)_____17

Bank of the United States v. Planters' Bank of Georgia, 9 Wheat. 904, 907, 6 L.Ed. 244 (1824)_____17

Barnes v. State of Missouri, 960 F.2d 63, 65[6] (8th Cir. 1992)_____18

Carey v. Piphus, 435 U.S. 247, 254, 98 S.Ct. 042, 1054[6], 55 L.Ed.2d 252 (1978)_____23, 26

Casey v. City of Cabool, 12 F.3d 799 (8th Cir. 1993)_____24

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985)_____13, 14

Derrickson v. Board of Education, 703 F.2d 309, 315 (8th Cir. 1983)_____15, 28

Division of Family Services v. Cade, 939 S.W.2d 546 (Mo.App.W.D. 1997)_____12, 16

Dixon v. Holden, 923 S.W.2d 370 (Mo.App. W.D. 1996)_____19, 20, 21, 22

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 355[3], 39 L.Ed.2d 662 (1974)_____16

Edwards v. Schoemel, 765 S.W.2d 607 (Mo.banc 1989)_____2. 16

Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566,
121 L.Ed2d 494 (1992)_____24, 25, 26, 29

Fast v. School District of City of Ladue, 728 F.2d
1030, 1033[1] (8th Cir. 1984)_____24, 27

Fort Stewart Schools v. Federal Labor Relations
Authority, 495 U.S. 641, 110 S.Ct. 2043, 2051,
109 L.Ed.2d 659 (1990)_____15, 28

Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358,
362[2] (1991)_____19

Hamby v. City of Liberty, _____ (Mo.App. WD
08/30/1999)_____12

Hankins v. Finnel, 964 F.2d 853, 856[2]
(8th Cir. 1992)_____14

Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933,
1939, 76 L.Ed2d 40 (1983)_____24, 29

Hogue v. Clinton, 791 F.2d 1318, 1323, (8th Cir.),
cert. denied, 479 U.S. 1008, 93 L.Ed.2d 704,
107 S.Ct. 648 (1986)_____23

Hopkins v. Saunders, 93 F.3d 522 (8th Cir. 1996)
(*Hopkins I*)_____10, 11, 12, 16, 17, 19, 23, 25, 29

Hopkins v. Saunders, 199 F.3d 968 (8th Cir. 1999)
(*Hopkins II*)____11, 12, 13, 17, 19, 22, 26, 27, 28, 29, 31, 32

Mathews v. Eldridge, 424 U.S. 319, 335,
96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976)_____14

McKenna v. Personnel Advisory Board, 702 S.W.2d 548, 554[12] (Mo.App.W.D. 1985)_____15, 16, 28

Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270 (1974)_____15, 28

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 19L.Ed2d 1263, 88 S.Ct. 964 (1968)_____5, 30

Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184, 84 S.Ct. 1207 (1963)_____17, 29

Parton v. GTE North, Incorporated, 971 F.2d 150 (8th Cir. 1992)_____27

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124[16] (1996)_____19

Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), *cert denied,* 464 U.S. 932 (1983)_____21

Wolf v. Missouri State Training School for Boys, 517 S.W.2d 138 (Mo.banc 1974)_____12, 16

AUTHORITIES

7 CFR Sec. 800.0 _____ 6

7 CFR Sec. 800.1 _____ 6

7 CFR Sec. 800.196 _____ 6

7 U.S.C. Sec. 71 _____ iv, v, 10, 17, 29

7 U.S.C. Sec. 74 _____ 6

7 U.S.C. Sec. 79 _____ 6

7 U.S.C. Sec. 84.(g) _____ 6

7 U.S.C. Sec. 87f. (h) _____ 18

28 U.S.C. § 1254 (1) _____ 1

28 U.S.C. § 1291 _____ 11

28 U.S.C. Sec. 1738 _____ 4

42 U.S.C. Sec. 1983 ___ i, ii, iii, iv, v, 5, 10, 19, 20, 23, 30, 32

42 U.S.C. Sec. 1985(3) _____ 10

42 U.S.C. Sec. 1988 _____ 5, 10, 24

42 U.S.C. Sec. 2000e _____ 5, 10

42 U.S.C. Sec. 2000e-2 _____ 5

42 U.S.C. Sec. 2000e-3 _____ iii, iv, 5, 10, 11, 30, 32

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (1)(A) _____ 8

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (2)(A) _____ 8

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (2)(B) _____ 9

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VIII(5)_____i, ii, 9

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number XIV. _____9

Missouri Constitution: Article I: Section 2_____4, 10

Missouri Constitution: Article I: Section 8_____3, 10

Missouri Constitution: Article I: Section 10_____3, 10

Missouri Revised Statutes: Chapter 36:
Section 36.030_____7

Missouri Revised Statutes: Chapter 36:
Section 36.031_____7

Missouri Revised Statutes: Chapter 36:
Section 36.350_____7

Missouri Revised Statutes: Chapter 36:
Section 36.380_____7

Missouri Revised Statutes: Chapter 36:
Section 36.390.5_____8

Missouri Revised Statutes: Chapter 105:
Section 105.055_____iii, iv, 8, 10, 16, 31, 32

Missouri Revised Statutes: Chapter 105:
Section 105.711-726_____19, 20, 21, 22

Missouri Revised Statutes: Chapter 411:
Section 411.145_____6

Missouri Revised Statutes: Chapter 411:
Section 411.151 19

U.S. Constitution: First Amendment: Article I 3, 10, 11

U.S. Constitution: Fifth Amendment: Article V 3, 10

U.S. Constitution: Eleventh Amendment.
Article X 13, 16, 21

U.S. Constitution: Fourteenth Amendment:
Article XIV 4, 10

OPINIONS AND ORDERS IN THE COURTS BELOW

The December 16, 1999 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed, is reported at Hopkins v. Saunders, 199 F.3d 968 (8th Cir. 12/16/1999) (*Hopkins II*), and is reprinted in the Appendix to this Petition at pp. 2-21.

The January 26, 2000 order of the Court of Appeals for the Eighth Circuit, denying rehearing is unreported and is reprinted in the Appendix to this Petition at p. 1.

The prior opinion of the United States District Court for the Western District of Missouri, entered June 16, 1998, in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at pp. 22-23.

The prior opinion of the United States District Court for the Western District of Missouri, entered April 22, 1998, in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at pp. 24-25.

The prior judgment of the United States District Court for the Western District of Missouri entered on February 27, 1998 in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at pp. 26-30.

The prior order of the United States District Court for the Western District of Missouri, entered November 7, 1997 in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at p. 31.

The prior order of the United States District Court for the Western District of Missouri, entered September 30, 1997 in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at pp. 32-40.

The January 23, 1996 order of the Court of Appeals for the Eighth Circuit, denying rehearing is unreported and is reprinted in the Appendix to this Petition at p. 41.

The August 23, 1996 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed, is reported at Hopkins v. Saunders, 93 F.3d 522 (8th Cir. 1996) (*Hopkins I*), and is reprinted in the Appendix to this Petition at pp. 42-51.

The prior order of the United States District Court for the Western District of Missouri, entered January 9, 1996 in Case No.94-4458-CV-C-5, is unpublished, and is reprinted in the Appendix to this Petition at pp. 52-78.

The prior judgment of the Circuit Court of Cole County, Missouri entered on May 4, 1995 in Case No. CV-194-1028CC, is unpublished, and is reprinted in the Appendix to this Petition at pp. 79-80.

The prior order of the Personnel Advisory Board of the State of Missouri entered on October 18, 1994 in Case No. NM95-001, is unpublished, and is reprinted in the Appendix to this Petition at pp. 81-84.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 16, 1999. The order of the Court of Appeals denying rehearing was entered on January 26, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution: First Amendment: Article I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Missouri Constitution: Article I: Section 8.

"That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts."

U.S. Constitution: Fifth Amendment: Article V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ."

Missouri Constitution: Article I: Section 10.

"That no person shall be deprived of life, liberty or property without due process of law."

U.S. Constitution: Eleventh Amendment. Article XI.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by citizens of another state, or by citizens or subjects of any foreign state."

U.S. Constitution: Fourteenth Amendment: Article XIV.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Missouri Constitution: Article I: Section 2.

"That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."

28 U.S.C. Sec. 1738.

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of

a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

42 U.S.C. Sec. 1983.
Text is reprinted in Appendix to this Petition at pp. 92-93.

42 U.S.C. Sec. 1988.
Text is reprinted in Appendix to this Petition at pp. 93-94.

42 U.S.C. Sec. 2000e.
Text is reprinted in Appendix to this Petition at pp. 94-96.

42 U.S.C. Sec. 2000e-2.
Text is reprinted in Appendix to this Petition at p. 96.

42 U.S.C. Sec. 2000e-3.

"Other unlawful employment practices.

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings—

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an

unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

7 U.S.C. Sec. 74.
Text is reprinted in Appendix to this Petition at p. 86.

7 U.S.C. Sec. 79.
Text is reprinted in Appendix to this Petition at pp. 86-90.

7 U.S.C. Sec. 84.(g).
Text is reprinted in Appendix to this Petition at p. 90.

7 U.S.C. Sec. 87f. (h).

"District court jurisdiction. The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories and possessions of the United States shall have jurisdiction in cases arising under this chapter."

7 CFR Sec. 800.0.
Text is reprinted in Appendix to this Petition at pp. 98-101.

7 CFR Sec. 800.1.
Text is reprinted in Appendix to this Petition at p. 101.

7 CFR Sec. 800.196.
Text is reprinted in Appendix to this Petition at pp. 101-106.

Missouri Revised Statutes: Chapter 411: Section 411.145.

"The Missouri department of agriculture is hereby authorized to conduct official grain inspection business outside the boundaries of the state of Missouri; provided that, such business:

(1) Is conducted in a manner that is consistent with the provisions of this chapter concerning the providing of official grain inspection and weighing services;
(2) Is in compliance with the rules and regulations promulgated by the Federal Grain Inspection Service in regard to providing official inspection and weighing services; and
(3) Any expenditures involved are in compliance with the state of Missouri's budget process and the office of administration's rules, regulations and guidelines."

Missouri Revised Statutes: Chapter 36: Section 36.030.
Text is reprinted in Appendix to this Petition at pp. 108-110.

Missouri Revised Statutes: Chapter 36: Section 36.031.
Text is reprinted in Appendix to this Petition at pp. 110-111.

Missouri Revised Statutes: Chapter 36: Section 36.350.
Text is reprinted in Appendix to this Petition at pp. 111-112.

Missouri Revised Statutes: Chapter 36: Section 36.380.

"An appointing authority may dismiss for cause any employee in his division occupying a position subject hereto when he considers that such action is required in the interests of efficient administration and that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the appointing authority gives to such employee a written statement setting forth in substance the reason therefor and files a copy of such statement with the director. When it is not practicable to give the notice of dismissal to an employee in person, it may be sent to the employee by certified or registered mail, return receipt requested, at his last mailing address as shown

in the personnel records of the appointing authority. Proof of refusal of the employee to accept delivery or the inability of postal authorities to deliver such mail shall be accepted as evidence that the required notice of dismissal has been given. If the director determines that the statement of reasons for the dismissal given by the appointing authority shows that such dismissal does not reflect discredit on the character or conduct of the employee, he may, upon request of the employee, approve reemployment under section 36.240, in any class in which the employee has held regular status. Any regular employee who is dismissed shall have the right to appeal to the board as provided under section 36.390."

Missouri Revised Statutes: Chapter 36: Section 36.390.5. Text is reprinted in Appendix to this Petition at pp. 113-114.

Missouri Revised Statutes: Chapter 105: Section 105.055. Text is reprinted in Appendix to this Petition at pp. 115-116.

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (1)(A).

"Demotions in, and dismissals from, employment shall be made for cause under rules uniformly applicable to all positions of employment. No appointment, promotion, demotion, or dismissal shall be made because of favoritism, prejudice or discrimination."

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (2)(A).

"Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline, or any other aspect of personnel administration, because of political or religious

opinions or affiliations or because of race, national origin, or any other non-merit factors is prohibited."

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (2)(B).

"An applicant or employee who feels himself adversely affected in his opportunity for employment, in his status as an employee, or in his condition of employment because of discrimination may under this rule appeal to the board for a review of the alledged (sic) discriminatory action or practice."

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VIII(5).

"Dismissals – The director may dismiss for cause any employee in his division occupying a position subject to the classified service when he considers that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the director gives to the employee a written statement setting forth in substance the reason therefor and files a copy of the statement with the board. If the board determines that the statement of reasons for the dismissal given by the director shows that the dismissal does not reflect discredit on the character or conduct of the employee, they may upon request of the employee, approve reemployment eligibility in an appropriate class or classes. Any regular employee who is dismissed shall have the right to appeal to the board as provided in these rules."

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number XIV.

Text is reprinted in Appendix to this Petition at pp. 119-120.

STATEMENT OF THE CASE

Petitioner Tommy D. Hopkins, a long-time employee of the Division of Grain Inspection and Warehousing (the Grain Division) of the Missouri Department of Agriculture (the Department), brought a civil action in the U.S. District Court for the Western District of Missouri, seeking relief under **7 U.S.C. § 71, *et seq.*, 42 U.S.C. §§ 1983, 1985(3), 1988 and 2000e-3(a), Article I, §§ 2, 8 and 10 of the Missouri Constitution**, and **§ 105.055, RSMO**. Petitioner requested a jury trial. (D.Ct. Doc. 2; Appendix hereto at p. 124).

Following an order from the U.S. District Court for the Western District of Missouri denying in large part respondents' dispositive motion, respondents took an interlocutory appeal to the U.S. Court of Appeals for the Eighth Circuit, which resulted in a published opinion, **Hopkins v. Saunders, 93 F.3d 522 (8th Cir. 1996). (*Hopkins I*)**. The case was remanded to the district court for further proceedings.

On remand, the district court found by way of cross motions for summary judgment that petitioner had a property interest in his job as Director of the Grain Division of the Missouri Department of Agriculture. Upon a bench hearing, the district court found that petitioner would have been dismissed from his position even if his due process rights had not been violated, and awarded petitioner nominal damages, attorney's fees and entered final judgment on all petitioner's claims. Petitioner's post-trial motions were denied.

Petitioner appealed the district court's denial of his claim for reinstatement and from the court's failure to rule on his claims that respondents violated his rights under the **First Amendment**, the **Fourteenth Amendment**, **42 U.S.C. §§ 2000e-3(a)** and **§105.055, RSMO**.

The respondents cross-appealed, contending that the district court committed error in finding that petitioner had a property interest in his job and in awarding petitioner nominal damages and attorney fees which resulted in a published opinion, **Hopkins v. Saunders, 199 F.3d 968 (8th Cir. 1999) (*Hopkins II*).**

In ***Hopkins II***, the panel found that petitioner was dismissed from his position as director of the Grain Division of the Department without receiving prior notice or a hearing. The panel found that petitioner had a protected property right interest in his position as director of the Grain Division. The panel found that petitioner had never received a post termination hearing from the respondents. The panel found that petitioner had adequately pled his **First Amendment** and **42 U.S.C. §§ 2000e-3(a)** claims but he had waived these claims because he had failed to adequately assert them to the district court.

Furthermore, the panel vacated the district court's award of nominal damages by finding that in the instant case that an award of nominal damages is legal in nature and therefore barred by the immunity findings in ***Hopkins I***. The panel vacated petitioner's attorney fee award on a finding that absent the nominal damage award a "declaration that his procedural due process rights were violated" is not sufficient to confer prevailing party status. The panel found that federal law is determinative of what process is due and that State (of Missouri) law is irrelevant. The panel ruled against petitioner in all other matters.

The jurisdiction for the Court of Appeals for the Eighth Circuit is based on **28 U.S.C. §1291**, which provides for jurisdiction over a final judgment from a U.S. District Court.

REASONS FOR GRANTING THE WRIT

I.

Under Missouri case law, when an employee has established that he or she is entitled to due process protections, as Petitioner has done here, and when an employee's dismissal has been found to be in violation of due process safeguards, as has been found here, the dismissed employee is entitled—without further hearing—to immediate reinstatement and back pay to the date of the invalid dismissal. In *Hopkins II*, the panel declared that State (of Missouri) law is "irrelevant" in determining what process is due.

Neither the panel decision in ***Hopkins I*** nor the panel decision in ***Hopkins II*** pays any attention to, or gives credence to, Missouri case law that requires that a public employee who has not been given adequate, specific notice of the grounds for suspension or dismissal is entitled to reinstatement and back pay retroactive to the date of suspension or dismissal. **Division of Family Services v. Cade, 939 S.W.2d 546 (Mo.App.W.D. 1997); Wolf v. Missouri State Training School for Boys, 517 S.W.2d 138 (Mo.banc 1974); Edwards v. Schoemel, 765 S.W.2d 607 (Mo.banc 1989).**

In **Wolf**, 517 S.W.2d at p. 142, the Missouri Supreme Court held that, where the dismissal notice required by statute was not properly given, "the discharge of respondent [employee Wolf] **did not take effect."** (emphasis added) Likewise, in **Cade**, 939 S.W.2d at p. 555-56, an employee who was suspended without proper notice was entitled to reinstatement and back pay. See, also, **Edwards v. Schoemel**, 765 S.W.2d at p. 610 and **Hamby v. City of Liberty, Case #56352 (Mo.App. WD 08/30/1999).**

The panel decision in ***Hopkins II*** held that Petitioner Hopkins had a property interest, or legitimate claim of entitlement, in continued employment unless dismissed for cause. The record is replete with admissions and findings that Petitioner Hopkins was never presented with any grounds whatsoever for his dismissal prior to his being dismissed. Additionally, as admitted by the panel in ***Hopkins II*** the record is void of any document being introduced as evidence to the District Court that sets forth the specific reason(s) Petitioner Hopkins was dismissed.

In **Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985)**, the Supreme Court noted the importance of depriving a person of pay, stating it had previously recognized "the severity of depriving a person of the means of livelihood." **Loudermill** premised the requirement of a pre-termination hearing on the Supreme Court's recognition that a public employee's interest in retaining his job until given an opportunity to contest the reasons for his dismissal outweighs the governmental interest in immediate termination of unsatisfactory employees and avoidance of administrative burdens. **Id.** at 542-45. The Court noted that a pre-termination hearing may be the employee's sole meaningful opportunity to invoke the decision maker's discretion in cases where the facts are clear but the propriety of the dismissal may not be. **Id.** at 543. The Court stated unequivocally that:

> "It is preferable to keep a qualified employee on than to train a new one. A governmental employer has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." **Id.** at 544-45 (footnote omitted).

In **Loudermill**, the Court thus held that due process entitles a tenured public employee, at a minimum, to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before termination. **Id.** at 546. Although the Court did not require a full evidentiary hearing and a definitive resolution of the propriety of the discharge prior to termination, it based this portion of its holding on the availability under state law of a full post-termination administrative hearing and judicial review. See **id**. at 545-48. The Court thus contemplated that an employee with a constitutionally protected property interest in his job would receive both an opportunity to respond to charges against him before cessation of his pay and a reasonably prompt post-termination hearing on the merits of his dismissal.

In the instant case, Petitioner Hopkins was fired by the Missouri Department of Agriculture six years ago. The Respondents steadfastly refused to accord Petitioner a hearing of any kind as to the reasons for his dismissal. Petitioner has been deprived of his career as an Agriculture Department employee and has been forced to seek other less remunerative and less secure employment. Petitioner never received a pre-termination notice nor was he accorded a pre-termination hearing and he fought for over four years to obtain any type of post-termination hearing. Even at the hearing before the trial court the Respondents failed to place before the trier of fact a notice—a "bill of particulars"—specifically setting forth why the Petitioner was terminated. Petitioner is entitled by law to receive back pay to the date of his improper dismissal and continuing to the date of any proper dismissal made in accordance with due process. **Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).**

The Merit System Plan adopted by the Department of Agriculture pursuant to the Governor's Executive Order of February 1, 1978, provided:

> **"No dismissal of a regular employee shall take effect unless, prior to the effective date thereof,** the director gives to the employee a written statement setting forth in substance the reason therefor and files a copy of the statement with the board." (emphasis added) (Portion of Ex. 5 to D.Ct. Doc. 98)

It is well established that state agencies must comply with their own internal procedures. "It is essential in our system of justice that statutes and regulations are followed punctiliously." **McKenna v. Personnel Advisory Board, 702 S.W.2d 548, 554[12] (Mo.App.W.D. 1985).** See **Derrickson v. Board of Education, 703 F.2d 309, 315 (8th Cir. 1983); Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270 (1974).** "It is a familiar rule of administrative law that an agency must abide by its own regulations." **Fort Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 641, 110 S.Ct. 2043, 2051, 109 L.Ed.2d 659 (1990).**

Based on the fact that Petitioner Hopkins was fired without the required notice and without a hearing, under Missouri case law his dismissal never took effect. Therefore, Missouri case law requires that Petitioner Hopkins be reinstated to his position forthwith.

Petitioner Hopkins is entitled to be paid his back pay from June 10, 1994, until he is properly dismissed (if he is ever, indeed to be dismissed) in accordance with due process safeguards and in compliance with state law, rules and

regulations, and the Department of Agriculture's Merit System Plan.

In **Wolf**, the Missouri Supreme Court ruled that the employee was entitled to back pay to the date of the improper dismissal, subject to reduction by such amount(s) as the employee earned or could have earned during the period he was deprived of his employment. **Wolf, 517 S.W.2d at pp. 144-145.** In **McKenna**, the dismissed employees were reinstated with back pay. **McKenna, 702 S.W.2d at p. 550.** Likewise, the suspended employees in **Cade** and **Edwards** were reinstated with back pay. **Cade, 939 S.W.2d at p. 555; Edwards, 765 S.W.2d at p. 610.**

II.

The Eighth Circuit panel decisions in both *Hopkins I* and *Hopkins II* overlooks the fact that the State of Missouri waived both its Eleventh Amendment protection and its sovereign immunity by seeking and obtaining designation as an official inspection and weighing agency under the U.S. Grain Standards Act.

Neither panel decision discusses the issue of whether the State of Missouri waived its **Eleventh Amendment** immunity, its sovereign immunity and the qualified immunity of its officials when it first entered into the Designation Agreement with the U. S. Department of Agriculture for designation as an official inspection agency and when it renewed its Designation Agreement every three years thereafter. Therefore, the panel decisions have overlooked an important and decisive issue of law.

Absent consent, waiver or abrogation, it is true that the **Eleventh Amendment** provides immunity to the States and their agencies and officials from damage suits in the federal courts. **Edelman v. Jordan, 415 U.S. 651, 94 S.Ct.**

1347, 1355[3], 39 L.Ed.2d 662 (1974). However, the law is also clear that a State may waive its immunities from suit, and that of its employees, and thus sovereign immunity and **Eleventh Amendment** immunity are not defenses.

The United States Supreme Court, in **Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184, 84 S.Ct. 1207 (1963),** held that the State of Alabama could be sued for damages under the Federal Employers' Liability Act (FELA) for injuries suffered by workers working for a state-owned railroad, because the State had waived its immunity to monetary damages by operating the state-owned railroad. By operating the railroad, the Court said, the State of Alabama had "necessarily consented" to any suits authorized by law. The Court noted that a State's immunity from suit has been well-recognized, but further stated that "when a State leaves the sphere that is exclusively its own and [voluntarily] enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." **Parden at 84 S.Ct. 1215[15].**

It has long been established that, when a governmental entity engages in business in competition with private enterprise, "it divests itself...of its sovereign character, and takes that of a private citizen." **Bank of the United States v. Planters' Bank of Georgia, 9 Wheat. 904, 907, 6 L.Ed. 244 (1824),** quoted in **Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 582, 96 S.Ct. 1854, 1862, 48 L.Ed.2d 301 (1976).**

In the instant case, both the panel decision in ***Hopkins I*** and the panel decision in ***Hopkins II*** overlook the fact that the State of Missouri "necessarily consented" to suit when it sought and obtained designation to perform the services of an officially licensed grain inspection and weighing agency, an activity that the State carries on for payment of fees and the

earning of profits for the Grain Inspection Fee Fund. Just like the State of Alabama operating a state-owned railroad, the State of Missouri voluntarily entered into the area of grain inspection and weighing, and thereby waived its immunities and subjected itself and its employees to the federal laws and regulations of the federalized grain inspection and weighing program. The State of Missouri ***on at least three occasions***, voluntarily entered into agreements with the U. S. Department of Agriculture and FGIS to provide various inspection, weighing and commodity-related services, all of which were under the umbrella of the federal Grain Standards Act and regulations promulgated pursuant thereto.

The United States Grain Sttandards Act states in pertinent part that:

> "District court jurisdiction. The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories and possessions of the United States shall have jurisdiction in cases arising under this chapter." **(7 U.S.C. Sec. 87f. (h)).**

Both panel decisions in this case are directly contrary to the rule established by the Court of Appeals of the Eighth Circuit in **Barnes v. State of Missouri, 960 F.2d 63, 65[6] (8th Cir. 1992)**, in which the Eighth Circuit held that a State may waive its sovereign immunity to suit in federal court where the waiver is made by the express language of the statute or "by such overwhelming implications from the text as will leave no room for any other reasonable construction."

In the instant case, the Eighth Circuit appears to overlook the fact that the State of Missouri repeatedly waived its freedom from suit in the federal courts by entering into designation agreements with the U. S. Department of

Agriculture and thereby subjecting itself to the same regulations and lawsuits that would apply to private businesses and individuals operating designated inspection and weighing agencies. The Eighth Circuit 's decisions are also contrary to the decision of the United States Supreme Court in **Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124[16] (1996)**, where the Court stated that the language of a federal statute may "make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit." And, because the State of Missouri has waived its immunities, the individual Respondents are not entitled to immunity, because the only immunities available to them are the immunities that the governmental entity possesses. **Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358, 362[2] (1991).**

III.

The Eighth Circuit panel decisions in both *Hopkins I* and *Hopkins II* erroneously holds that the Respondents are entitled to Eleventh Amendment immunity from monetary damages. The decision overlooks the decision of the Missouri Court of Appeals in Dixon v. Holden, 923 S.W.2d 370 (Mo.App.W.D. 1996), holding that the State Legal Expense Fund, Sections 105.711-726, RSMo 1994, is available to compensate persons for violations of their civil rights under 42 U.S.C. Sec. 1983 and that sovereign immunity is therefore not a defense.

Both panel decisions hold that the Respondents are entitled to Eleventh Amendment immunity because any monetary award entered against them would be paid from the Grain Inspection Fee Fund established pursuant to **Section 411.151, RSMO**, and that fund is a part of the state treasury, is restricted by state and federal law, and cannot be expended without legislative appropriation.

However, the panel decisions overlook the decision of the Missouri Court of Appeals in **Dixon v. Holden**, **923 S.W.2d 370 (Mo.App.W.D. 1996)**, in which the Missouri Court of Appeals held that the State has waived its sovereign immunity from suit for damages to the extent it has provided funds for the defense of lawsuits and payment of judgments under the **State Legal Expense Fund, Secs. 105.711-726, RSMO 1994**. In the **Dixon** case, a former State Highway Patrol trooper sued two superior officers in federal court under **42 U.S.C. Sec. 1983** for violating his constitutional rights (just as Petitioner Hopkins has done in the instant case). Eventually, Dixon obtained a judgment in the federal court (based on a settlement) against his superior officers in the amount of $225,000.00. The State Treasurer and the Commissioner of Administration refused to pay the judgment and Dixon brought suit in the state court to compel payment of the judgment from the State Legal Expense Fund. The circuit court and then the Court of Appeals ordered that the judgment be paid from the Fund.

The Missouri Court of Appeals ruled that the language of **Sec. 105.711.2, RSMO** providing that money in the Fund "shall be available for the payment of any claim or any amount of any final judgment rendered by a court of competent jurisdiction against...[a]ny employee...upon conduct of such employee arising out of and performed in connection with his or her official duties on behalf of the state..." covers a suit filed under **42 U.S.C. Sec. 1983**.

In the instant case, there is no dispute that the Respondents were acting on behalf of the State and in their employment for the State when they summarily terminated Petitioner Hopkins from his job as Division Director. The Missouri Court of Appeals opinion in **Dixon** leaves no room for argument that the money in the Legal Expense Fund would be available to pay any judgment which Petitioner

Hopkins might obtain against the Respondents. In the **Dixon** case, the State Treasurer and Commissioner of Administration argued, as have the Respondents here, that the suit against them violates sovereign immunity. The Missouri Court of Appeals rejected this argument and held that the Fund is merely a voluntary assumption of defense and payment of judgments or claims against state employees sued for their conduct arising out of and performed in connection with their official duties on behalf of the State, and therefore the doctrine of sovereign immunity is not even an issue. As for the defendants' argument that the federal suit violated the State's **Eleventh Amendment** immunity, the Court of Appeals rejected the argument without discussion, citing **Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), *cert denied*, 464 U.S. 932 (1983).** **Dixon** holds that the State Legal Expense Fund is funded by legislative appropriations, from which the Commissioner of Administration may self-insure or may purchase insurance coverage.

Neither panel decision accords a discussion to this holding of the Missouri Courts. Even if the Eighth Circuit is correct that the Respondents herein are entitled to immunity because the Grain Inspection Fee Fund is a part of the state treasury, it is clearly and well-established that the State of Missouri has voluntarily agreed by statute to defend lawsuits filed against state employees and to pay the judgments entered against those employees. (It is worthy of note that the Respondents herein are being defended by the State Attorney General, just as were the defendants in the **Dixon** case.)

Therefore, the Defendants in the instant case are not entitled to claim Eleventh Amendment immunity, because the State of Missouri has expressly agreed to defend them and to pay any judgment against them, pursuant to **Sections 105.711-726, RSMO**.

Neither panel decision accords a discussion to the holding of the Missouri Court of Appeals in **Dixon** where it was held that the State has waived its sovereign immunity from suit for damages to the extent it has provided funds for the defense of lawsuits and payment of judgments under the **State Legal Expense Fund, Secs. 105.711-726, RSMO 1994**, and the State Legal Expense Fund is funded by legislative appropriations, from which the Commissioner of Administration may self-insure or may purchase insurance coverage.

IV.

Petitioner Hopkins is entitled to an award of at least nominal damages for violation of his due process rights and is entitled to an award of attorneys' fees as the prevailing party.

In ***Hopkins II*** the panel was in error when it denied Petitioner Hopkins an award of at least nominal damages and denied him prevailing party attorney fees. Petitioner Hopkins is entitled to an award of at least nominal damages for the Respondents' violation of Petitioner Hopkins' constitutional due process rights, because of the admitted failure to give Petitioner Hopkins notice of the reasons for his termination and failure to accord him any hearing at all to establish cause for his termination. Secondly, Petitioner Hopkins is entitled to an award of reasonable attorneys' fees because Petitioner Hopkins is the prevailing party on the due process issue, an important constitutional right, and because Petitioner Hopkins should have judgment that vindicates Petitioner Hopkins' rights, secures an important right to the public, and alters the legal relationship between the parties.

It is well-established that a plaintiff is entitled to an award of at least nominal damages whenever he or she has established an absolute right to procedural due process and

demonstrates that his or her rights to procedural due process have been violated. Petitioner Hopkins has done so in this case.

The basic purpose of a damages award in a §1983 action is to compensate persons for injuries caused by the deprivation of constitutional rights. **Carey v. Piphus, 435 U.S. 247, 254, 98 S.Ct. 1042, 1054[6], 55 L.Ed.2d 252 (1978):**

> "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed (citations omitted) . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury."

The Eighth Circuit has followed this rule in **Hogue v. Clinton, 791 F.2d 1318, 1323, (8th Cir.), cert. denied, 479 U.S. 1008, 93 L.Ed.2d 704, 107 S.Ct. 648 (1986).**

In the instant case, both the trial court and the Eighth Circuit panel has held that Petitioner Hopkins has established that he had a property interest in his continued employment and that the Respondents (some or all) violated his due process rights by failing to give him the notice and hearing required by the 1978 merit system plan established pursuant to the Governor's Executive Order.

Petitioner Hopkins has been precluded from establishing and recovering any compensatory or punitive damages from the Respondents because the Court of Appeals found that the Respondents were protected by sovereign immunity. **Hopkins v. Saunders, 93 F.3d 522 (8th Cir. 1996).** However, the holding in **Carey** mandates that

Petitioner Hopkins be awarded at least nominal damages for the due process violations.

42 U.S.C. §1988 provides that a district court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." A plaintiff is a prevailing party if he or she succeeds "on **any** significant issue . . . which achieves **some** of the benefit the parties sought in bringing suit." (emphasis added) **Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 1939, 76 L.Ed2d 40 (1983).** It is not necessary that a plaintiff succeed on all of the significant issues, or that the court award all of the benefit sought by the complaint. **Fast v. School District of City of Ladue, 728 F.2d 1030, 1033[1] (8th Cir. 1984).**

The leading current case on the awarding of attorneys' fees under §1988 appears to be **Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed2d 494 (1992).** In that case, the Supreme Court held that a plaintiff who wins even nominal damages is a prevailing party under §1988. A prevailing party is one who has obtained a judgment that alters the legal relationship between the parties and modifies the defendant's behavior in a way that directly benefits the plaintiff. Even an award of $1 in nominal damages constitutes relief on the merits, and it affects the defendant's behavior toward the plaintiff by at least forcing the defendant to do something (pay the plaintiff $1) which he would not otherwise have done. **Farrar, supra, at 506 U.S. 113.**

The primary purpose for allowing the prevailing party his or her attorneys' fees in a civil rights action is to promote diffuse private enforcement of civil rights law by allowing citizens to monitor rights violations at their source, and to impose the costs of rights violations on the violators. **Casey v. City of Cabool, 12 F.3d 799 (8th Cir. 1993).** A plaintiff bringing a civil action "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that

Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest . . . . " **Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 19L.Ed2d 1263, 88 S.Ct. 964 (1968).**

In the instant case, Petitioner Hopkins has prevailed on two important aspects of his case: (a) He has established that he was entitled to but was deprived of his constitutional right to procedural due process before being fired from his job, and (b) He obtained a hearing before the district court on the causes for his dismissal, and therefore he has obtained at least a portion of the relief he implicitly requested in Count IV of his Second Amended Complaint.

Once it is established that a party is the prevailing party, the district court has substantial discretion in determining a reasonable amount of attorneys' fees to be awarded. In her concurring opinion in **Farrar**, Justice O'Connor outlined three factors that should be considered in determining whether and how much a prevailing party should be awarded in attorney's fees:

(1) the difference between the amount recovered and the damages sought;

(2) the significance of the legal issue on which the plaintiff prevailed; and

(3) any public goal or purpose the litigation might have served.

Farrar, supra, at 506 U.S. 116-122; Jones v. Lockhart, 29 F.3d 422, 423-24 (8th Cir. 1994).

As for the first factor, in the instant case, it must be borne in mind that Plaintiff was precluded from recovering compensatory damages from the Respondents because the Eighth Circuit panel in ***Hopkins I*** overruled the trial court and found that the Respondents were protected by sovereign

immunity. Had it not been for that ruling, Petitioner Hopkins would have been permitted to adduce evidence of his actual losses and could well have recovered for those losses, including not only six years of lost pay at $60,000-plus per year, lost retirement benefits, but also medical costs and other consequential losses.

The second factor is entitled to much greater weight. Both the trial court and the panel decision in ***Hopkins II*** found that the Respondents denied Petitioner Hopkins his procedural due process rights. In fact, the Respondents have admitted that they denied Petitioner Hopkins the hearing and notice required by the 1978 merit system plan, on the basis that Petitioner Hopkins was not covered by the 1978 Plan and was therefore not entitled to such procedural protections. However, the Missouri Personnel Advisory Board (Appendix hereto at pp. 81-84), affirmed by the Cole County Circuit Court (Appendix hereto at pp. 79-80), found that Petitioner Hopkins was, indeed, covered by the 1978 merit plan. Likewise, both the trial court and the panel decision in ***Hopkins II*** found that Petitioner Hopkins had a property interest in continued employment because of his inclusion under the umbrella of the 1978 Plan.

Thus, Petitioner Hopkins has been vindicated on the most important facet of this litigation—the deprivation of his right to due process. This Court in **Farrar** described the right to due process as "absolute," and said that an award of nominal damages to remedy its deprivation "recognizes the importance to organized society that [this] righ[t] be scrupulously observed." **Farrar, supra, 506 U.S. at 112, quoting Carey v. Piphus at 436 U.S. 266.**

With respect to the third factor, Petitioner Hopkins has prevailed in another very important respect in that the result herein will serve to deter Respondents and other public officials from depriving other public employers of their due

process rights. The trial court's holding and the panel decision in ***Hopkins II*** that the Respondents herein have deprived Petitioner Hopkins of his property right to continued employment without due process of law is an important vindication of constitutional rights. "When public officials violate the rights of citizens, and courts so declare, an important deterrent effect results. Other public officials are less likely to violate other citizens' rights in the future." **Fast v. School District of City of Ladue, 728 F.2d at 1030 (8th Cir. 1984).**

Another factor that should be considered by the Court is the complexity of the case and the issues. The trial court was in a unique position to assess the complexity of the case and to determine the reasonableness of counsel's fees, and this is why the trial court is given broad discretion to determine the amount of fees to be awarded. **Parton v. GTE North, Incorporated, 971 F.2d 150 (8th Cir. 1992).** The instant case has involved rather complicated and extensive factual issues and disputes, as well as the hotly contested issue of the Respondents' sovereign immunity. Numerous extensive briefs have been filed with the trial court on these issues, and this case has twice gone to the Eighth Circuit Court of Appeals. Accordingly, this is an important factor weighing in favor of awarding Petitioner Hopkins his attorneys' fees.

Finally, it should be noted that many of these fees and expenses could have been avoided had the Respondents and the State of Missouri accorded Petitioner Hopkins the procedural due process to which he was entitled in the first place. The fees and expenses incurred were incurred because the State and the Respondents violated Petitioner Hopkins' due process rights by firing him without notice, without reasons being given, and without a hearing. These problems could have been rectified, for the most part, over six years ago if the Respondents had acknowledged Petitioner

Hopkins' rights under the 1978 Executive Order and Merit Plan and accorded him at least a post-termination hearing. The Petitioners, however, chose to litigate, even though it was clear on the surface that Petitioner Hopkins' rights had been violated.

CONCLUSION

In ***Hopkins II***, the panel declared that State (of Missouri) law is "irrelevant" in determining what process is due to a tenured, Missouri public employee that can only be dismissed for cause. What role does a State's (Missouri) case law play when that employee is discharged without notice, without a pre-termination hearing and without having a post-termination hearing being given within a meaningful time frame. This case provides this Court with an excellent opportunity to set forth the proper elements, procedures and remedies for violation of due process rights and the role that State law does or does not have in determining what process is due. In other words "how absolute" is this type of employee's right to receive due process.

This case provides this Court with an excellent opportunity to set forth to what extent public agencies are required to follow their own internal procedures in the dismissal of their employees. The panel decision in ***Hopkins II*** seems to be contrary to the following holdings. "It is essential in our system of justice that statutes and regulations are followed punctiliously." **McKenna v. Personnel Advisory Board, 702 S.W.2d 548, 554[12] (Mo.App.W.D. 1985).** See **Derrickson v. Board of Education, 703 F.2d 309, 315 (8th Cir. 1983); Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270 (1974).** "It is a familiar rule of administrative law that an agency must abide by its own regulations." **Fort Stewart Schools v. Federal**

Labor Relations Authority, 495 U.S. 641, 110 S.Ct. 2043, 2051, 109 L.Ed.2d 659 (1990).

The judgment of the United States Court of Appeals for the Eighth Circuit should be reviewed by this Court because the Eighth Circuit has overlooked critical and decisive issues of law and has failed to apply clearly established law by holding that the State of Missouri and the Respondents are entitled to qualified and Eleventh Amendment immunity. As set out in the above, the panel decisions in ***Hopkins I*** and ***Hopkins II*** are in conflict with previous decisions of the Eighth Circuit and of this Court on this highly sensitive Constitutional question. The law requires the Court holding that the State of Missouri waived its immunities and subjected itself to suit just like any other party when it sought and received designation as an officially designated inspection and weighing agency under the **U. S. Grain Standards Act. 7 U.S.C. 71 et. seq**. This case provides this Court with an excellent opportunity to further refine when a state waives its Eleventh Amendment protection. Review of this important issue will allow this Court to resolve the split that exists between the Circuits as to whether or not any vestiges of **Parden** remain good law.

This case provides this Court with an excellent opportunity to further refine what is a prevailing party in a due process case. The panel decision in ***Hopkins II*** seems to be contrary to this Court's holdings in **Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 1939, 76 L.Ed2d 40 (1983).**

This case provides this Court with an excellent opportunity to further refine when attorney fees are allowable in a due process case. The panel decision in ***Hopkins II*** seems to be contrary to this Court's holdings in **Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed2d 494**

(1992) and Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 19L.Ed2d 1263, 88 S.Ct. 964 (1968)..

This case provides this Court with an excellent opportunity to further refine and clarify for the Circuits what is nominal and what constitutes legal damages in a due process case.

This case provides this Court with an excellent opportunity to further refine and clarify when courts are required to make a "pre-textual" or "mixed motive" analysis as to the reasons as for a **42 U.S.C. § 1983** plaintiff's termination when:

(a) there was direct testimony that Petitioner Hopkins had a female employee report actions made toward her by her supervisor that she deemed to be sexual in nature);

(b) there was direct testimony that she filed a formal sexual harassment complaint;

(c) there was direct testimony that Petitioner Hopkins took immediate action in discussing the matter with the employee about whom the complaint was made and reported the complaint and the action taken to his (Petitioner Hopkins) supervisor (Hearing Transcript, Vol. II, pp. 290-292);

(d) there was direct testimony that Petitioner Hopkins' supervisor recommended that Petitioner Hopkins be fired (Hearing Transcript, Vol. I, pp. 120-121);

(e) there was direct testimony that the firing of Petitioner Hopkins' was the original idea of his direct supervisor and that Petitioner Hopkins handling of the sexual harassment complaint was a factor in his recommendation to fire Petitioner Hopkins (Hearing Transcript, Vol. I, pp. 120-121);

(f) **42 U.S.C. Section 2000e-3(a)** states in pertinent part that:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . ., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

(g) **Missouri Revised Statutes: Chapter 105: Section 105.055.2.** states in pertinent part that:

"No supervisor or appointing authority of any state agency shall:

(1) Prohibit a state employee from or take any disciplinary action whatsoever against a state employee for the disclosure of any alleged prohibited activity under investigation or any related activity, or for the disclosure of information which the employee reasonably believes evidences:

(a) A violation of any law, rule or regulation;

* * * * *

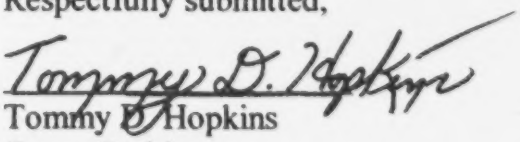
4. As used in this section, "disciplinary action" means any dismissal, demotion, transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work, whether or not the withholding of work has affected or will affect the employee's compensation."

In the instant case neither the trial court or the panel decision in ***Hopkins II*** addresses this direct testimony. In fact, they both totally ignore these impermissible—by both Missouri statute and Federal statute—reasons for termination. Rather, they both state that Petitioner Hopkins

was fired for cause and that is the end of the discussion. Both the trial court's decision and the panel decision in ***Hopkins II*** are in direct conflict with **42 U.S.C. Section 2000e-3(a)** and **Missouri Revised Statutes: Chapter 105: Section 105.055.2**. Also, both the trial court's decision and the panel decision in ***Hopkins II*** are in direct conflict with previous holdings of this Court as to when courts are required to make a "pre-textual" or "mixed motive" analysis as to the reasons as for a **42 U.S.C. § 1983** plaintiff's termination.

For the foregoing reasons, the Petitioner Hopkins respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,



Tommy D. Hopkins
Pro se Petitioner
2408 Oakview Dr.
Jefferson City, Missouri 65109-0738
Tel – (573) 636-9534
Fax – (573) 635-0941